FILE COPY

Nos. 679 and 777

Office-Supreme Court, U.S.
FILED
APR 8 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

TRANS WORLD AIRLINES, INC., *Petitioner*,

v. No. 679

DELTA AIR LINES, INC., *et al.*, *Respondents*.

EASTERN AIR LINES, INC., *Petitioner*,

v. No. 777

CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

EDWARD C. WESTWOOD
PETER S. CRAIG
Attorneys for Respondent,
American Airlines, Inc.
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.

April 8, 1960

TABLE OF CONTENTS

	Page
Counterstatement of the Case	2
Argument	
I. The Decision Below Is Clearly Correct	7
II. No "Clarification" of the Law Is Needed	10
III. There Is No Conflict Between Circuits	16
IV. The Decision Below Rests on an Independent, Unchallenged Ground	18
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Ashbacker Radio Corp. v. *Federal Communications Comm'n*, 326 U.S. 327 (1945) 10, 11, 12, 13, 14, 15, 19
Atlantic Seaboard Operation, 4 C.A.B. 633 (1944) 11
Capitol Airways, Inc. v. *Civil Aeronautics Board*, U.S. Sup. Ct. No. 786, Oct. Term 1959 16
Dallas to the West Service Case, C.A.B. Docket No. 7596, *et al.* 14
Delta Air Lines, Inc. v. *Civil Aeronautics Board*, 228 F.2d 17 (D.C. Cir. 1955) 8, 13
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 178 F.2d 726 (D.C. Cir. 1949) 8, 11, 12
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 243 F.2d 607 (D.C. Cir. 1956) 8, 12
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 247 F.2d 562 (D.C. Cir. 1957) 8, 13
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 271 F.2d 752 (2d Cir. 1959) 7, 13, 16, 17, 18
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, U.S. Sup. Ct. No. 785, Oct. Term 1959 ..... 7, 16
Federal Communications Comm'n v. *National Broadcasting Co.* (KOA), 319 U.S. 239 (1943) 18
Federal Communications Comm'n v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 18
Federal Trade Comm'n v. *American Tobacco Co.*, 274 U.S. 543 (1927) 16
Frontier Airlines, Inc. v. *Civil Aeronautics Board*, 259 F.2d 808 (D.C. Cir. 1958) 8, 13

Page

Great Lakes-Southeast Service Case, C.A.B. Docket No. 2306, *et al.* 16, 17
Magnum Import Co. v. *Coty*, 262 U.S. 159 (1923) 7
Midwestern Gas Transmission Co. v. *Federal Power Comm'n*, 258 F.2d 660 (D.C. Cir. 1958), *vacated and remanded for dismissal for mootness*, 358 U.S. 280 (1959) 14
National Airlines, Inc. v. *Civil Aeronautics Board*, 249 F.2d 13 (D.C. Cir. 1957) 8, 12
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951) 16
Northeastern Gas Transp. Co. v. *Federal Power Comm'n*, 195 F.2d 872 (3d Cir.), *cert. denied*, 344 U.S. 818 (1952) 14
Northeast Pacific Consolidation Case, 6 C.A.B. 541 (1945) 11
North American Airlines, Inc. v. *Civil Aeronautics Board*, 241 F.2d 445 (D.C. Cir. 1957) 13
Northwest Airlines, Inc. v. *Civil Aeronautics Board*, 194 F.2d 339 (D.C. Cir. 1952) 8, 13
Seaboard & Western Airlines, Inc. v. *Civil Aeronautics Board*, 181 F.2d 777 (D.C. Cir. 1949) 8, 11, 12
Service to Anchorage, 3 C.A.B. 522 (1942) 11
Southeastern Area Local Service Case, C.A.B. Order No. E-14754, Dec. 18, 1959 12
Southern Service to the West Case, 12 C.A.B. 518 (1951) 2
Southern Transcontinental Service Case, C.A.B. Docket No. 7984, *et al.* 3, 6, 9
United Air Lines, Inc. v. *Civil Aeronautics Board*, 228 F.2d 13 (D.C. Cir. 1955) 8, 12
West Coast Case, 8 C.A.B. 636 (1947) 11
Western Air Lines, Inc. v. *Civil Aeronautics Board*, 184 F.2d 545 (9th Cir. 1950) 12

Statute:

Federal Aviation Act, § 416(b), 72 Stat. 731, 771 (1958), 49 U.S.C. § 1386(b) 20

Miscellaneous Sources:

Address of Chief Justice Vinson to the American Bar Ass'n, 69 Sup. Ct. V (1949) 7
Official Airline Guide, April 1960 9
Stern & Gressman, Supreme Court Practice (2d ed. 1954) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

TRANS WORLD AIRLINES, INC., *Petitioner*, v. DELTA AIR LINES, INC., *et al.*, *Respondents*.	No. 679
EASTERN AIR LINES, INC., *Petitioner*, v. CIVIL AERONAUTICS BOARD, *et al.*, *Respondents*.	No. 777

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

The Court has before it two petitions for a writ of certiorari to review the same judgment of the United States Court of Appeals for the District of Columbia Circuit. One of them (No. 679) urges that the court below went much too far in its decision invalidating a route award by the Civil Aeronautics Board. The

other (No. 777) urges that the court did not go nearly far enough. These circumstances alone will tempt the Court to conclude what a brief analysis of the proceeding will clearly demonstrate: that the decision of the court below is entirely correct and that no proper ground exists for this Court's exercise of its certiorari jurisdiction.

COUNTERSTATEMENT OF THE CASE

American Airlines' interest in this proceeding is limited to its interest in southern transcontinental (*i.e.*, California to Florida and Georgia) air service. American is presently licensed to participate in the only through air services in these markets that the Civil Aeronautics Board has found required by the public convenience and necessity, the "southern transcontinental interchanges."[1] These operations provide through-plane California-Georgia service over the routes of American and Delta Air Lines with a required stop at Dallas,[2] and through-plane California-Florida service over the routes of American, Delta and National Airlines, with required stops at Dallas and New Orleans.[3] In addition, American is (and has been for almost four years) an applicant for extension of its California-Texas route into Georgia and Florida, for the provision of single-carrier (*i.e.*, one-airline) south-

[1] Southern Service to the West Case, 12 C.A.B. 518, 540-43 (1951).

[2] This interchange operates over American's route from Los Angeles and San Francisco to Dallas and over Delta's route from Dallas to Atlanta.

[3] This interchange operates over American's route from Los Angeles and San Francisco to Dallas, over Delta's route from Dallas to New Orleans, and over National's route from New Orleans to Tampa and Miami.

ern transcontinental service. This application is now being heard in the *Southern Transcontinental Service Case*, currently pending before a hearing examiner of the Board.

The Board instituted the *St. Louis-Southeast Service Case* in 1956 as a limited-area proceeding to be concerned solely with the need for improved air service within the area between St. Louis and points in Florida and Georgia. A number of airlines (although not American) sought consolidation therein of their applications for a St. Louis-Southeast route, which up to that time had been operated on a monopoly basis by Eastern Air Lines. Trans World Airlines moved for consolidation of an application to extend its California-St. Louis route into Georgia and Florida. Because of the possible impact of such an authorization on its interest (as both licensee and applicant) in southern transcontinental service, American intervened and urged that the Board, by appropriate restrictions on any award to be made, prevent the injection of new southern transcontinental service issues into the limited-area proceeding.

A number of efforts in addition to Trans World's were made to expand the case. In setting forth the issues to be litigated, the Board emphasized its firm intention that there be *no* expansion in the limited, regional scope of the proceeding. It recognized that the only practical alternative to such expansion was to guarantee that it would not authorize, between points within the defined area of the case and points outside, effective new service prejudicial to interests not being heard because of the limited scope. It therefore imposed as a minimum a required stop at St. Louis on any award to be made, and it placed in issue the ques-

tion of whether a more stringent restriction was necessary adequately to protect unheard interests. Having offered this protection to interests outside the limited scope of the case, it refrained from placing in issue either "mutual exclusivity" (*i.e.*, whether the grant of an application being heard would preclude the grant of any not being heard) or the question of whether the duplication of existing services not wholly within the area was required by the public convenience and necessity. American participated in the *St. Louis-Southeast* hearings (held in the fall of 1956) for the sole purpose of demonstrating that an award to Trans World, subject only to a mandatory stop at St. Louis, would be an effective (and thus prejudicial) southern transcontinental authorization, and that a more stringent restriction must therefore be imposed.

Two years later a divided (3-2) Board issued its decision in the *St. Louis-Southeast* case. The majority found service additional to that provided by Eastern between St. Louis and Florida Georgia required by the public convenience and necessity. Notwithstanding the Board's prior assurance that no effective beyond-area service would be authorized, the majority awarded Trans World a St. Louis-Miami extension (with no additional restriction) *because* Trans World could thereby provide effective southern transcontinental service; however, it expressly declined to find such a service required by the public convenience and necessity. In seeking reconsideration, American, Delta and National urged that the award to Trans World, unless restricted to preclude effective California-Southeast through service, would deprive them of a hearing on the issues of (1) the possible mutual exclusivity of their unheard southern transcontinental applications

and (2) whether the duplication of their licensed southern transcontinental services was required by the public convenience and necessity. In response, the majority refused either to limit the award to Trans World or to grant a hearing on the new issues raised by the grant of effective southern transcontinental authority.

The Board also, unanimously, made an award of Memphis-Birmingham authority to Delta. To preclude Delta from providing effective Kansas City-Southeast service by virtue of this award, the Board imposed a restriction requiring three stops between Kansas City and Florida; the Board found that, as restricted, the Delta award did not authorize effective through Kansas City-Southeast service.

On petition for review, the United States Court of Appeals for the District of Columbia Circuit, speaking unanimously through Chief Judge Prettyman, reversed and remanded the Trans World award. It upheld the Board's finding that additional service was required between St. Louis and the Southeast. However, it found that the Board, by strictly limiting the proceeding to issues of St. Louis-Southeast service and the protective restrictions necessary to maintain that limited scope, had excluded issues of new southern transcontinental service from the proceeding. Therefore, when the Board made what it conceded was a grant of effective southern transcontinental authority to Trans World, it had denied the parties the notice, hearing and findings to which they were entitled on the questions (1) whether such an award precluded the grant of pending southern transcontinental applications and (2) whether the duplication of existing licensed operations by such an award was in the public interest. The

court further found that the evidence American had advanced in support of its request for an adequate protective restriction established, at least *prima facie*, that the award to Trans World, subject only to a St. Louis stop, *would* preclude the grant of applications in the *Southern Transcontinental* case and that its impact on the licensed interchanges *did* raise doubts as to whether such a duplication of services is in the public interest.

The court left it to the Board to determine what course of action would be most appropriate upon remand, including (but not limited to) the imposition on the Trans World award of a restriction that would preclude effective southern transcontinental service, or the holding of a full evidentiary hearing on the questions of mutual exclusivity of unheard southern transcontinental applications and the public interest in duplication of licensed southern transcontinental services. The court also (1) asked the Board to clarify its findings concerning certain claims of mutual exclusivity by Eastern, (2) held that those claims would, if valid, be automatically disposed of by the Board's action, pursuant to the court's remand, on the claims of American, Delta and National, and (3) affirmed the Board's limited award of Memphis-Birmingham authority to Delta.

None of the parties, including the Board, sought rehearing or clarification of the court's decision and opinion. Trans World seeks a writ of certiorari to contest the court's invalidation of the award of effective southern transcontinental authority to Trans World (No. 679). Eastern seeks a writ of certiorari to contest the court's failure to reject the finding of a need for competition to Eastern in the St. Louis-

Southeast market, and its failure to invalidate the Memphis-Birmingham award to Delta (No. 777).[4] The Government (acting for the Board) has not petitioned for a writ of certiorari.

ARGUMENT

I. The decision below is clearly correct

No matter how many times and in how many ways the petitioners state their arguments, it is plain that they are asking this Court to exercise its certiorari jurisdiction for no other reason than that they believe the decision below was wrong. Even if there were any substance to these contentions, no proper ground for the issuance of the writ would have been asserted. For it is well established that the certiorari jurisdiction was not conferred simply for the correction of errors in lower court decisions.[5] But in fact the petitioners' extravagant allegations of error are entirely without merit.

Any attack on the decision below must overcome a strong presumption of validity. The opinion of the Court of Appeals for the District of Columbia Circuit (well recognized as the Court of Appeals best qualified in matters of administrative law) is an exceptionally thorough and well-supported analysis of the problem presented and of the means for resolving it. It was rendered unanimously by a distinguished panel—Chief

[4] Eastern's petition is also obviously designed to enhance its efforts to obtain review in No. 785 (in which it attacks a Second Circuit decision upholding the Board in another case) on the ground of an alleged conflict with the instant case.

[5] See, *e.g.*, Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923); Address of Chief Justice Vinson to the American Bar Ass'n, 69 Sup. Ct. V, VI-VII (1949).

Judge Prettyman and Circuit Judges Bazelon and Fahy—unsurpassed on the federal bench in ability and experience in dealing with agency procedures, especially in the field of aviation law.[6] It cannot be lightly supposed that there is any proper basis for reviewing a decision with such credentials, particularly when no party sought rehearing and the Government itself has not asked for certiorari.

The criticisms the petitioners level at the opinion of the court below largely center on alleged "inconsistencies"—internal inconsistencies and inconsistencies with subsequently disclosed facts, both of which are said to demonstrate error in the court's judgment. The internal inconsistency alleged by both petitioners (pp. 21-22 of petition in No. 679; pp. 20-22 of petition in No. 777) is the failure of the court to overturn the limited Memphis-Birmingham award giving Delta alleged beyond-area (Kansas City-Southeast) authority, while invalidating an award giving Trans World effective beyond-area (California-Southeast) authority.

---

[6] For example, Chief Judge Prettyman wrote for the court in Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, 181 F.2d 777 (D.C. Cir. 1949), National Airlines, Inc. v. Civil Aeronautics Board, 249 F.2d 13 (D.C. Cir. 1957), and Frontier Airlines, Inc. v. Civil Aeronautics Board, 259 F.2d 808 (D.C. Cir. 1958); he was senior member of the panel that issued the *per curiam* opinion in Delta Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 17 (D.C. Cir. 1955); and he was a member of the panels that rendered Eastern Air Lines, Inc. v. Civil Aeronautics Board, 178 F.2d 726 (D.C. Cir. 1949), Eastern Air Lines, Inc. v. Civil Aeronautics Board, 243 F.2d 607 (D.C. Cir. 1956), and Eastern Air Lines, Inc. v. Civil Aeronautics Board, 247 F.2d 562 (D.C. Cir. 1957). Judge Fahy was a member of the panels that rendered Northwest Airlines, Inc. v. Civil Aeronautics Board, 194 F.2d 339 (D.C. Cir. 1952), United Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 13 (D.C. Cir. 1955), Eastern Air Lines, Inc. v. Civil Aeronautics Board (1956), *supra*, and National Airlines, Inc. v. Civil Aeronautics Board, *supra*.

The rationale of the court's decision is that, the Board having assured the parties it would not award effective beyond-area authority, it could not then award such authority without providing parties substantially affected thereby with adequate notice and hearing. The difference between the Trans World and Delta awards is quite simply that the former entails *effective* beyond-area authority, but the latter does not. As the court points out, the Board *based* its award to Trans World on the effectiveness of a one-stop California-Southeast operation (Opinion, pp. B5-B6),[7] while it found that the heavily restricted Delta award was not an effective Kansas City-Southeast service (Opinion, p. B21).[8] As restricted, the Delta award, unlike the Trans World award, was plainly within the limited scope of the proceeding, so there was no denial of notice and hearing. Nor was such a denial ever alleged by any party.

Trans World (pp. 16-17 of petition in No. 679) urges that subsequent facts have given the lie to the court's finding of probable prejudice to American and others. The "Actual Facts" alleged by Trans World with respect to the impact of its award on the interchanges and on applications in the *Southern Transcontinental*

[7] (All citations to the opinion of the court below are to Appendix B of the petition in No. 679.) In fact Trans World does operate a daily one-stop jet round trip between Miami and Los Angeles via St. Louis (Official Airline Guide, April 1960).

[8] See p. 5, *supra*. Corroboration of this finding by the Board lies in the fact that Delta now offers *no* through service between Kansas City and Florida (Official Airline Guide, April 1960). Eastern (under the Board-approved Braniff-Eastern interchange via St. Louis) is authorized to provide one-stop through-plane service between Kansas City and Miami, and in fact it does provide through-plane (albeit multi-stop) service between those two points (*ibid.*).

case are characterized by such distortion and omission as to present a totally false picture. There is nothing to be gained by trying that issue to this Court with statements and counterstatements concerning what facts outside the record allegedly show. The place for Trans World to marshal such facts (and for American to refute them) is in the hearing on mutual exclusivity and impact on licensed operations that, as the court below held, the parties have up to now been denied.

II. No "CLARIFICATION" OF THE LAW IS NEEDED

Fifteen years ago this Court placed its imprimatur on the principle of federal administrative procedure that from that time has been known as the *Ashbacker* doctrine, although it had long been an established rule of agency conduct.[9] The doctrine is simply an articulation of a fundamental rule of fair hearing—that where the grant of one application for license authority would preclude the grant of another concurrently pending application (*i.e.*, where the two applications are "mutually exclusive"), both must be comparatively heard before either is granted. It is indirectly involved in the instant case in that, as the court below held, one consequence of the Board's failure to give notice that it might make an effective southern transcontinental grant to Trans World was to deprive American and others of a fair opportunity to establish that *their* southern transcontinental applications were mutually exclusive with Trans World's and must therefore be heard comparatively with it.

---

[9] Ashbacker Radio Corp. v. Federal Communications Comm'n, 326 U.S. 327, 331 n. 5 (1945).

The petitioners assert, as a reason for a grant of the writ, not only that the *Ashbacker* doctrine as applied to air route proceedings is in a state of "intolerable confusion," but that it has been in such a state for more than ten years; the Court is therefore asked "unequivocally [to] explain the law for the guidance of all" (pp. 22, 28 of petition in No. 679; pp. 18, 24 of petition in No. 777). That these contentions are utterly without foundation is perfectly clear from the fact that before the court below the petitioners (and also the Board), far from suggesting that there was any confusion in the application of *Ashbacker* to air route proceedings, argued extensively from the decided cases and found them logical and consistent. What most clearly establishes the disingenuousness of the petitioners' plaints of confusion is the fact that neither of them asked the court below for rehearing or for clarification of its decision.

As a matter of fact, the Civil Aeronautics Board was applying the *Ashbacker* doctrine to air route proceedings long before *Ashbacker* was decided.[10] And when *Ashbacker* was decided, the Board recognized its applicability to air route proceedings before any court made such a suggestion.[11] Over the years the Board has continued to apply the basic principle of fair hear-

[10] See, *e.g.*, Northeast Route Consolidation Case, 6 C.A.B. 541, 544 (1945); Atlantic Seaboard Operation, 4 C.A.B. 633, 634 (1944); Service to Anchorage, 3 C.A.B. 522, 528 (1942).

[11] See West Coast Case, 8 C.A.B. 636, 637-38 (1947); the first aviation court case involving the doctrine (although, it is interesting to note, *Ashbacker* was not cited) was Eastern Air Lines, Inc. v. Civil Aeronautics Board, 178 F.2d 726 (D.C. Cir. 1949), and the first to cite the *Ashbacker* case was Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, 181 F.2d 777 (D.C. Cir. 1949).

ing implicit in *Ashbacker* without ever suggesting that it was confused or unduly confined by the applicability of the doctrine to air route proceedings. Indeed, the Board, in the exercise of its discretion, has often gone much further in applying the *Ashbacker* doctrine than any court would require it to do.[12]

During the past twelve years there have been, as petitioners point out (p. 4 of petition in No. 679; p. 18 of petition in No. 777), a number of air route cases involving the *Ashbacker* doctrine in the Courts of Appeals, principally the District of Columbia Circuit—twelve of them, to be exact, other than the instant case. This fact, however, rather than being symptomatic of confusion in the area, is nothing more than a tribute to the perseverance of disappointed air carriers. Seven of these twelve cases sought interlocutory review of Board consolidation orders setting up route proceedings; of the seven, six were summarily dismissed[13] and the other was eventually dismissed at the request of

[12] For example, in the Southeastern Area Local Service Case, C.A.B. Order No. E-14754, December 18, 1959, pp. 16-19, where mutual exclusivity was fully and squarely in issue; the Board applied the *Ashbacker* doctrine on behalf of a carrier that had presented no evidence at all and had not even cross-examined the witnesses of other carriers; the Board found the exclusivity established by the evidence of the parties against which the doctrine was being asserted.

[13] National Airlines, Inc. v. Civil Aeronautics Board, 249 F.2d 13 (D.C. Cir. 1957); Eastern Air Lines, Inc. v. Civil Aeronautics Board, 243 F.2d 607 (D.C. Cir. 1956); United Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 13 (D.C. Cir. 1955); Western Air Lines, Inc. v. Civil Aeronautics Board, 184 F.2d 545 (9th Cir. 1950); Seaboard & Western Airlines, Inc. v. Civil Aeronautics Board, note 11, *supra*; Eastern Air Lines, Inc. v. Civil Aeronautics Board, note 11, *supra*.

the Board after a stay had been issued.[14] Of the five remaining cases that went to court after the Board's final decision, the Board was fully sustained in four.[15] The lone instance in which the Board was reversed on an *Ashbacker* question was *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*,[16] and neither the Government nor the airline involved was sufficiently disturbed or confused to ask this Court for a writ of certiorari.

The plain fact is that the Board and (to the limited extent they have been involved) the Courts of Appeals have been eminently successful in adapting a meaningful right to a fair comparative hearing to complex air route cases. Surely the mere fact that *Ashbacker*, a decision arising out of an F.C.C. proceeding, is now cited in C.A.B. cases (although the principle involved has always been adhered to) is no reason for granting a writ of certiorari, although that is what at least one of the petitioners seems to suggest (pp. 3, 22 of petition in No. 679). In the past, the Court has quite sensibly refused such opportunities as it has had to review the

[14] Delta Air Lines, Inc. v. Civil Aeronautics Board, 228 F.2d 17 (D.C. Cir. 1955); after the court issued a stay, the Board eliminated the areas of claimed prejudice in its proceeding and obtained vacation of the stay and dismissal of the court action.

[15] Eastern Air Lines, Inc. v. Civil Aeronautics Board, 271 F.2d 752 (2d Cir. 1959); Frontier Airlines, Inc. v. Civil Aeronautics Board, 259 F.2d 808 (D.C. Cir. 1958); Eastern Air Lines, Inc. v. Civil Aeronautics Board, 247 F.2d 362 (D.C. Cir. 1957); North American Airlines, Inc. v. Civil Aeronautics Board, 241 F.2d 445 (D.C. Cir. 1957).

[16] 194 F.2d 339 (D.C. Cir. 1952). The court held that where there was only enough traffic for one new nonstop operator between two cities, applications for new authority must be given a comparative hearing with an application for removal of a restriction that would allow the applicant to perform the same service.

"extension" of *Ashbacker* to the proceedings of administrative agencies other than the F.C.C.[17]

Having done everything they could to create an illusion of confusion about the application of *Ashbacker* to air route cases, the petitioners then assert that the decision below adds to that confusion and will hamper the Board in its work. The lack of merit in such a contention is immediately apparent from the limited applicability of the court's decision. It is very rarely that the Board goes to the lengths it did in this case to exclude beyond-area considerations from an area proceeding; indeed, we know of no other trunkline route case in recent years where the Board consciously refrained from authorizing the parties to put in evidence on mutual exclusivity[18] but limited them to the issue of what restrictions would be necessary to maintain the narrow scope of the proceeding.

The decision below impinges upon neither the Board's power to conduct limited-area cases nor its power to

[17] For example, certiorari was denied (344 U.S. 818) in Northeastern Gas Transp. Co. v. Federal Power Comm'n, 195 F.2d 872 (3d Cir. 1952); it appears that the sole purpose of the grant of certiorari in Midwestern Gas Transmission Co. v. Federal Power Comm'n, 258 F.2d 660 (D.C. Cir. 1958), was to vacate the judgment and remand the cause for dismissal because of mootness. 358 U.S. 280 (1959).

[18] It should be noted that refraining from putting mutual exclusivity in issue is a definite step toward the maintenance of the most limited possible scope. The reason for this is that allowing parties to prove the mutual exclusivity of their excluded beyond-area applications does have a tendency to expand the case, since much of the evidence on that issue will be the same evidence that would be used in proving that the application should be granted. See, for example, the Board's listing of some of the factors that are involved in mutual exclusivity, in the order from the Dallas to the West Service Case (C.A.B. Docket No. 7596, *et al.*) reprinted at J.A. 785, 789.

make grants of effective transcontinental route authority: all it says is that if the Board wishes to do *both* in the *same* proceeding, it must make its intentions known soon enough that the parties may show how they will be prejudiced, and how the public interest will be affected, by such action. That this is not asking too much of the Board is confirmed by the fact that the Board did not seek rehearing below, bringing to the court's attention any adverse results that might ensue from its decision. And what is even more important, the Government has not asked this Court for a writ of certiorari, as it surely must have done if it believed the decision below should for any reason be reviewed.

Even if it were true that, because of confusion, there was a need to "clarify" or "re-examine" the application of *Ashbacker* to air route cases, the instant case would scarcely be an appropriate vehicle. Any examination of the essentials of the *Ashbacker* doctrine would require the Court to rove far, far beyond the facts of *this* case, for as we have noted, the doctrine is only indirectly involved here. This case asks only whether or not in certain circumstances a party must be allowed *to show its entitlement* to a comparative (*Ashbacker*) hearing; it does not raise the basic *Ashbacker* questions of when a comparative hearing *must be granted* and what kind of hearing qualifies as a "comparative hearing."

Furthermore, this case turns on its own peculiar facts—and very complex facts, at that. The facts establishing the Board's assurances that it would prevent beyond-area prejudice, and the facts establishing *prima facie* beyond-area prejudice, have been thoroughly and knowledgeably canvassed by the experi-

enced court below. This Court has frequently instructed the bar as to the inappropriateness of bringing such cases as this one to the Court,[19] not only because complex procedural and economic facts should be analyzed and determined by those closer to and more familiar with them, but also because any decision by this Court will be of extremely limited applicability.

III. There is no conflict between circuits

Both petitioners urge, with varying degrees of conviction, that the decision below is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*[20] (pp. 4, 20, 24, 26 of petition in No. 679; p. 23 of petition in No. 777). These allegations of conflict are entirely without substance.

The two cases present entirely different issues. The whole point of the decision below is that the Board, by severely limiting the scope of the *St. Louis-Southeast* proceeding, denied affected parties notice and a fair hearing with respect to an effective California-Florida route award. However, we are aware of no claim whatsoever in the *Eastern* case, by Eastern or by any other party, that it was denied any notice or hearing on the possibility that the *Great Lakes-Southeast* case[21] could produce a Minneapolis-Florida award. The Second Circuit's decision plainly shows that Eastern was on

---

[19] *E.g.*, National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951); Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543, 544 (1927).

[20] 271 F.2d 752 (1950); a writ of certiorari to review that proceeding is being sought by Eastern Air Lines, Inc. (No. 785) and Capitol Airways, Inc. (No. 786).

[21] The Board proceeding out of which the *Eastern* case arose.

full notice that it should prove the mutual exclusivity of its Minneapolis application in the *Great Lakes* case; but the decision below plainly shows that American and others were *not* on notice that they should—or would even be permitted to—prove the mutual exclusivity of their California applications in the *St. Louis-Southeast* case.[22] This may suggest conflicting or inconsistent procedures on the part of the Board in different cases, but it certainly does not bear any resemblance to a "conflict between circuits" for purposes of the certiorari jurisdiction.

One thing of which we may be sure is that the court below saw no conflict between its decision and that of the Second Circuit. In order to be absolutely certain that the court below was aware of the Second Circuit decision as it deliberated on the instant case, the Board filed that decision (which had been rendered on October 7, 1959) with the court two full months before the decision in the instant case was issued (on December 10, 1959).[23] The Second Circuit decision having been so pointedly brought to its attention, the court below

[22] Among the circumstances on which the respective courts based these findings were, no doubt, the facts that the Board (1) specifically placed "mutual exclusivity" in issue in the *Great Lakes* case, but did *not* in *St. Louis-Southeast*, and (2) specifically placed in issue more stringent restrictions to confine the scope of the case in the *St. Louis-Southeast* case but did *not* in *Great Lakes*. It is also apparent from the courts' decisions that Eastern produced *no* evidence on mutual exclusivity in *Great Lakes*, but American's evidence of a need for restrictions in *St. Louis-Southeast* did constitute a *prima facie* showing of mutual exclusivity.

[23] See Motion of the Civil Aeronautics Board for Leave to File Relevant Opinion, filed October 12, 1959; see also the *per curiam* order of the court below, October 14, 1959, ordering the opinion filed. The court also, on motion of Eastern, received a copy of Eastern's petition for rehearing in the Second Circuit case.

would surely have discussed, disapproved of, or distinguished that decision if it was in any way inconsistent with the court's careful, well-documented decision in the instant case. And if the parties, including the Board, had genuinely believed there was a conflict, they certainly would have sought rehearing on that point. The simple fact is that the Second Circuit decision has no bearing on the instant case, and there is no conflict between the two.

IV. The decision below rests on an independent, unchallenged ground

The decision below was not limited to the court's holding that American and others were deprived of notice, hearing and findings on the issue of the mutual exclusivity of their southern transcontinental applications. The court below also held that, by excluding beyond-area issues from the limited-area *St. Louis-Southeast* proceeding but then making a grant of effective southern transcontinental authority therein, the Board denied the licensees of the present southern transcontinental operations[24] notice, hearing and findings on the question whether a duplication of the licensed services is in the public interest (Opinion, pp. B15-B16). In so holding, the court was, of course, vindicating the well-recognized, overriding principle that precludes the duplication of an existing license found required by the public convenience and necessity unless such duplication is similarly found required.[25]

[24] *I.e.*, the interchanges conducted by American, Delta and National, described at p. 2, *supra*.

[25] See, *e.g.*, Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 86 (1953); Federal Communications Comm'n v. National Broadcasting Co. (KOA), 319 U.S. 239 (1943).

This major, independent arm of the decision below is not involved in any of the "Questions Presented" by the petitioners and remains substantially unchallenged.[26]

Thus, even if the Court should take this case on the so-called *Ashbacker* grounds and should fully perform the extraordinary task asked of it ("unequivocally explain the law [of *Ashbacker*] for the guidance of all"),[27] the proceeding would still have to be remanded to the Board for disposition of the independent matters raised by the decision of the court below that are not seriously challenged here.[28] Moreover, on such a remand, the Board could completely dispose of the case without reaching the *Ashbacker* issues that had been painstakingly resolved by this Court.[29] It is again clear that if the Court is to revisit *Ashbacker*, this case is not an appropriate vehicle for such an expedition.

* * *

[26] The petitioner in No. 777 did not attack it at all, and the petitioner in No. 679 merely asserted in a footnote that the court's holding on this point "appears clearly erroneous" (p. 28 of petition in No. 679).

[27] Petition in No. 777, p. 24.

[28] It would be no answer, of course, that the Court could (after bringing the case up on *Ashbacker* grounds) consider this independent, unchallenged ground; indeed, the possibility of the Court's considering the other ground is an additional reason for denying review. *Cf.* Stern & Gressman, Supreme Court Practice 112-113 (2d ed. 1954).

[29] On the basis of the question raised by the evidence as to the public interest in duplication of the interchanges, the Board could without further hearing impose on the Trans World award a restriction sufficient to eliminate that question (see Opinion, p. B14); or the Board might hold a hearing on that question alone and find that the public interest would be adversely affected by such duplication (Opinion, pp. B14, B15-B16). In either event the so-called *Ashbacker* issue would not be reached.

One further matter deserves brief attention. The petitioner in No. 679 has asserted that as a result of the decision below "St. Louis would be deprived of needed service to the Southeast" (p. 27 of petition in No. 679; see also *id.* at p. 5). This is simply not so. The court below sustained the Board's finding that the public convenience and necessity require the certification of additional service between St. Louis and Florida, and it sustained the Board's selection of Trans World to operate *that* service (Opinion, pp. B22-B24). The only aspect of the Trans World award of which the court below disapproved was the absence of a restriction against the provision of through southern transcontinental service—a service that the Board expressly refrained from finding required by the public convenience and necessity[30] and a service that the court found *prima facie* prejudicial to unheard interests. There is nothing, absolutely nothing, in the court's opinion to prevent the Board from permitting Trans World to provide, without any delay whatsoever, service between St. Louis and Florida—the only service that has been found required by the public convenience and necessity.[31] Indeed, the court suggested such a course as among those the Board might follow on remand (Opinion, p. B14). This Court should not be misled into supposing that the public interest will be in any way adversely affected by a denial of the writ of certiorari.

---

[30] See J.A. 495, 496.

[31] The Board could accomplish this either by amending Trans World's certificate to impose a restriction against through southern transcontinental service or by authorizing local St. Louis-Southeast service by an exemption, as provided for in § 416(b) of the Federal Aviation Act, 72 Stat. 731, 771 (1958), 49 U.S.C. § 1386(b).

CONCLUSION

These petitions for a writ of certiorari state no proper ground for this Court's exercise of its discretionary jurisdiction.[32] Their filing has served no other purpose than to prolong the injury being wrought upon American, its interchange partners and the public interest by the invalid award of southern transcontinental authority to Trans World. American urges that the petitions be summarily denied.

Respectfully submitted,

HOWARD C. WESTWOOD
PETER S. CRAIG
Attorneys for Respondent, American Airlines, Inc.
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.

April 8, 1960

[32] We do not discuss points I and III of the petition in No. 777, although we do not believe they state adequate reasons for granting the writ. We assume that the Solicitor General will cover these points in his memorandum to the Court.